

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEE CLARK,

Defendant-Appellant.

UNPUBLISHED

May 4, 2010

No. 289206

Oakland Circuit Court

LC No. 2007-215126-FC

Before: BANDSTRA, P.J., and BORRELLO and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to life imprisonment for the first-degree murder conviction and two years' imprisonment for the felony-firearm conviction. For the reasons set forth in this opinion, we affirm.

This case arises out of a murder that occurred on April 10, 2007, at the Sundance Shoe Store on Nine Mile in Ferndale at approximately 11:20 a.m. The victim, Charles Hardaway, died of multiple gunshot wounds to the legs. Witnesses who observed the shooting gave police a description of the suspect and the motor vehicle. Police radioed the information given to them and an officer made contact with the motor vehicle at the intersection of Spencer and Hilton. Before the officer could pull the vehicle over, it came to an abrupt stop and the driver, Martin Pitts, exited the vehicle, and was immediately ordered to the ground. While Pitts was dropping to the ground, a second suspect, matching the description given to police exited the passenger's side of the vehicle and fled. A special response team was assembled to locate the fleeing suspect. The officers came to a backyard on East Spencer where there was an aluminum shed. When they opened the shed they found defendant but no weapon. He did have a black coat on which matched the description given to police. A .45-caliber automatic gun was found at the crime scene by police, its magazine completely empty.

In exchange for a plea of guilty to second-degree murder, Martin Pitts testified at trial that his older brother had arranged to have the victim killed. Pitts testified that he initially agreed to kill the victim; but that he changed his mind and defendant had thereafter agreed to kill the victim. Pitts also testified that the victim was originally thought to be in a halfway house, but after he was spotted at the shoe store, Pitts arranged to drive defendant to the shoe store to commit the murder. Pitts testified that he dropped defendant off at a CVS parking lot near the

shoe store, then drove off to a prearranged spot where he was to pick up defendant. Pitts testified that he did not hear any shots but saw defendant running toward him breathing heavy and he jumped into the vehicle. After defendant had jumped into the vehicle, defendant told him that he had shot the victim and told Pitts to start driving.

Defendant also testified at trial, however his story was vastly different from that of Pitts. Defendant testified that Pitts had taken him to a flooring store and then to a liquor store where he bought and consumed a half pint of Hennessy in an effort to relieve himself from a hangover from the night before. Defendant further testified that he was intoxicated so he laid down in the back of the truck while Pitts went to a CVS store and got out of the car. Shortly after Pitts returned to the car and began driving, defendant testified that he heard Pitts say the police were coming. After the police had stopped the vehicle, defendant testified that he got out of the car and tried to go around by Pitts but the police started shooting at him so he started to run. Defendant testified as to how a forensic chemist could have found over twice the amount of gunpowder residue on his hands than is found in the typical case for such residue,¹ he stated that he last handled a gun on New Year's Eve 2007. He also denied that he had been hired by Pitts' brother, Maurice Moore, to kill the victim, whom Moore had allegedly believed killed his sister, Tanya.

Defendant was convicted as stated *infra*, and this appeal ensued.

Defendant argues that he was denied the effective assistance of counsel because counsel failed to request the mere presence jury instruction, CJI 2d 8.5, to be read along with the aiding and abetting jury instruction, CJI 2d 8.1. We note that a defendant must make a testimonial record in the trial court with a motion for a new trial that will evidentially support his claim of ineffective assistance of counsel. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), quoting *People v Jelks*, 33 Mich App 425, 431; 190 NW2d 291 (1971). When there is no evidentiary hearing or motion for a new trial at the trial level, review is limited to the errors apparent on the record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. The trial court's findings of fact are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v Le Blanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish a claim for ineffective assistance of counsel, a defendant must show (1) that counsel's assistance fell below an objective standard of professional reasonableness, and (2) that but for counsel's ineffective assistance, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687-88, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *LeBlanc*, 465 Mich at 578.

¹ Hayen Dannug, a forensic chemist who worked for the Detroit Crime Laboratory testified that in a typical case testing for gunpowder residue, five to ten particles are present on both hands. Defendant's hands were tested for gunpowder residue, and twenty-three particles were found on his hands.

The defendant “must overcome a strong presumption that counsel’s performance constituted sound trial strategy.” *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003), habeas gtd 388 F Supp 2d 789 (ED Mich, 2005), rev’d and remanded on other grds 481 F3d 315 (CA 6, 2007). Counsel’s decision concerning whether to request or refrain from requesting a jury instruction is usually a matter of trial strategy. *People v Robinson*, 154 Mich App 92, 93; 397 NW2d 229 (1986). Furthermore, the trial court is only required to give instructions that are supported by the evidence or facts of the case. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

In reviewing the existing record, defendant has not proven that counsel’s failure to request the mere presence jury instruction, CJI 2d 8.5, was deficient performance. The mere presence jury instruction applies where a defendant is charged with an aiding and abetting crime. See *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992). In the present case, defendant was not charged under an aiding and abetting theory. Nonetheless, the trial court agreed to read the aiding and abetting jury instruction based on the prosecution’s alternative theory. While the prosecution did argue an aiding and abetting theory in its closing argument, until then, the prosecution had argued that defendant was the shooter. Additionally, the defense argued that Pitts was the actual shooter and defendant had no knowledge of the murder until he was questioned by the police. It is probable that defense counsel decided not to request the mere presence jury instruction in order to focus the jury’s attention on acquittal rather than accomplice liability. “The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel.” *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000). While we cannot find that defendant has overcome the presumption that counsel’s actions constituted sound trial strategy, given the overwhelming evidence presented at trial against defendant, any deficiency in counsel’s performance did not prejudice defendant.

Defendant next argues that there was insufficient evidence to support his convictions of first-degree premeditated murder and felony-firearm because the prosecution failed to establish beyond a reasonable doubt the identity of the shooter. When reviewing a claim of insufficient evidence, this Court reviews the record de novo in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *In re Contempt of Henry*, 282 Mich App 656, 677; 765 NW2d 44 (2009). In reviewing the sufficiency of the evidence, this Court “must not interfere with the jury’s role as the sole judge of the facts.” *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005).

The elements of first-degree premeditated murder are: (1) the defendant intentionally killed the victim (2) with premeditation and deliberation. MCL 750.316; *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007). The elements of felony-firearm are: (1) the defendant possessed a firearm (2) during the commission or attempted commission of a felony. MCL 750.227b; *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Identity is an essential element of every crime. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). The prosecution must present sufficient evidence to prove beyond a reasonable doubt that the defendant committed the crimes alleged. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967).

Reviewing the evidence in the light most favorable to the prosecution and in determining whether a rational trier of fact could find that the essential elements of the crimes were proven beyond a reasonable doubt, the evidence is sufficient for a reasonable jury to have concluded that defendant was the shooter. Four eye witnesses to the shooting described the black puffy coat that defendant was found wearing. Pitts testified that defendant agreed to murder the victim for \$50,000, and he drove defendant to the Sundance Shoe Store to commit the murder. The gunpowder residue testing came back positive on defendant's hands and the gun recovered from the scene was the gun used to shoot all ten bullets at the victim. Defendant fled from the vehicle after Pitts stopped, despite being ordered to the ground by police. "[E]vidence of flight is admissible to support an inference of 'consciousness of guilt' and the term 'flight' includes such actions as fleeing the scene of the crime." *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008), quoting *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). Defendant hid in a nearby aluminum shed until he was found by police and taken into custody. Defendant was found with a black puffy coat, without a weapon, and a black winter hat was found in the shed. Additionally, defendant admitted he was with Pitts at the crime scene wearing a black puffy coat on the day of the murder. A rational jury could find from this evidence that defendant was the shooter.

Even though defendant submitted contradictory evidence, it was for the trier of fact to determine the credibility of the proofs presented. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998); *Unger*, 278 Mich App at 232. The jury heard the evidence and determined each witness's credibility. A rational trier of fact would be able to conclude beyond a reasonable doubt that defendant was the shooter who murdered the victim.

Affirmed.

/s/ Richard A. Bandstra
/s/ Stephen L. Borrello
/s/ Douglas B. Shapiro